

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DEC 20 1993

In the Matter of)
Limitations on Commercial Time on) MM Docket No. 93-254
Television Broadcast Stations)

To the Commission:

STOP CODE 1800D

COMMENTS OF SILVER KING COMMUNICATIONS, INC.

Michael Drayer
Executive Vice President,
General Counsel and
Secretary
SILVER KING COMMUNICATIONS,
INC.
12425 - 28th Street, North
St. Petersburg, FL 33716
(813) 573-0339

John R. Feore, Jr.
Suzanne M. Perry
D'wana R. Speight
DOW, LOHNES & ALBERTSON
1255 - 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Counsel for Silver King
Communications, Inc.

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SUMMARY OF COMMENTS

The Commission's expectation that television deregulation would foster experimentation and innovation has been realized with the institution of the home shopping format. This pioneering use of interactive television to bring shopping services directly to the home has proven extremely popular with the public, and the home shopping format has in consequence enjoyed steady growth.

Any new or reimposed restriction on home shopping's continued development would contravene the public interest. That regulatory guiding light is designed to be flexible and adaptable to reflect current market conditions. Today's video marketplace is characterized by an extraordinary degree of format and outlet diversity. As such, it differs dramatically from the media environment which existed at the time when the Commission first addressed concerns about overcommercialization and even from that which existed at the time of Television Deregulation. Today's public interest is thus drastically different from yesterday's.

In the contemporary video environment, past criticisms of television stations' commercial practices have lost their relevance. Similarly, claims that public dislike of commercialization justifies restriction of home shopping

formats are disproven by the format's continued growth and popularity.

Visceral dislike or disdain for the home shopping format does not afford a lawful basis for its regulation. The Commission has never based its decisions on subjective determinations that a particular program or format is "good" or "bad." Requests that it restrict the home shopping format would require abandonment of this constitutionally- and statutorily-required practice. The Commission cannot and must not do so.

Home shopping's critics have never cited any social harm or damage associated with the format. They have never explained why it is permissible for audiences to be entertained by "Gilligan's Island" or "NYPD Blue" but not by home shopping programming. They have never explained what is wrong or bad or unacceptable about the broadcast of commercial material in general or home shopping programming in particular. They have, in short, cited no governmental interest which would support governmental regulation of home shopping speech.

The need for a substantial governmental interest is particularly compelling in light of the affirmative benefits associated with the availability of home shopping programming. The Commission has expressly recognized these benefits, which include service to viewers who may not have

or desire other methods of shopping; home shopping's unmatched commitment to minority television station ownership; and home shopping's pioneering role in the introduction of interactive video services.

The First Amendment demands that content-based restrictions on speech, even pure commercial speech, must directly advance an asserted governmental interest in the least restrictive manner possible. Here, there has never been any demonstration of any governmental interest (much less a compelling one) in restriction of the home shopping format. To the contrary, its demonstrated benefits suggest a governmental interest in its unfettered development. The First Amendment, in short, precludes regulatory restrictions on the home shopping format.

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Silver King Communications, Inc. ["SKC"]^{1/}, by its attorneys, hereby submits herewith its Comments in the above-captioned proceeding.^{2/}

Introduction

On August 21, 1984, the Commission released its Report and Order substantially deregulating commercial

^{1/} SKC is the parent of the licensees of 12 television stations [the "SKC Stations"], all of which have a home shopping entertainment format and are affiliated with Network 2 of the Home Shopping Club, Inc., the programming subsidiary of Home Shopping Network, Inc. ["HSN"]. The SKC Stations were all acquired by HSN and operated through subsidiaries of that company until December 28, 1992, when the licensee subsidiaries were spun off to SKC, a publicly-owned stand alone corporation whose stock is traded on NASDAQ. See FCC File Nos. BTCCT-920918KD, KF-KJ, KL-KN, KP-KT.

^{2/} Notice of Inquiry, MM Docket No. 93-254, 7 FCC Rcd 7277 (1993) ["Notice"]. By Order dated November 22, 1993 (DA 93-1425) the due date for these comments was extended to December 20, 1993.

television.^{3/} Among other provisions, that decision eliminated the television commercial guidelines.^{4/} This action was based upon the Commission's recognition that the changed and increasingly competitive nature of the video marketplace made such artificial limitations unnecessary and unwise; the guidelines' repressive impact on "...the ability of commercial television stations to present innovative and detailed commercials;"^{5/} and the guidelines' "potential chilling effect on commercial speech."^{6/}

The Commission hoped that deregulation of television stations' commercial practices would foster innovation and experimentation. Television market developments have more than fulfilled this expectation. In particular, deregulation facilitated the introduction of a new broadcast television entertainment format: home shopping.^{7/} This pioneering application of interactive

3/ Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ["Television Deregulation"], recon. denied, Memorandum Opinion and Order, 104 FCC 2d 358 (1986), aff'd in part and remanded in part sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

4/ Former 47 C.F.R. § 0.283(a)(7).

5/ Television Deregulation, 98 FCC 2d at 1104.

6/ Id.

7/ HSN's home shopping entertainment programming carried on the SKC stations is divided into segments broadcast live with a host or hostess who presents merchandise available for purchase by viewers. Show hosts describe the

(continued...)

television, a harbinger of future technological innovations in transactional use of video capabilities, has earned widespread public acceptance and popularity.

Beginning in the fall of 1986 with HSN's acquisition of three television stations, televised home shopping services have flourished, reflecting the significant public demand for, and popularity of, this entertainment format. At present, for example, HSN provides two separate network services to numerous television stations throughout the country,^{8/} as well as an additional service for carriage on cable television systems.

HSN is not the only entity providing broadcast home shopping services, however. For example, noncommercial educational television station WTTW, Chicago, is seeking to institute a home shopping service on a national basis.^{9/}

7/ (...continued)
merchandise one product at a time, conveying information concerning its quality, uses, attributes and prices. Viewers may order the merchandise by using a toll-free telephone number. The hosts also engage callers in spontaneous on-air discussions concerning the programming, the products and callers' previous home shopping experiences, and share personal chatter such as family anecdotes and recipes.

8/ HSN's broadcast services make provision for affiliates' insertion of local public service, public affairs, news, informational, religious and children's programming, as well as local advertising and/or public service announcements.

9/ Communications Daily, November 3, 1993, at 6; "PBS Station Offers Shopping From Homes," The Wall Street Journal, October 15, 1993, at B14.

Local stations are also experimenting with home shopping programs.^{10/} Valuevision International, whose home shopping service initially relied on low power television stations, has recently acquired four full-service television stations, signalling institution of additional broadcast home shopping services.^{11/} Televised home shopping is even going international.^{12/} In other words, the public affirmatively desires and supports televised home shopping services.

If home shopping programming did not satisfy a strong public need, it would not be successful. People are not forced to watch home shopping programming -- there are a multitude of video alternatives in the marketplace -- and they are not forced to make purchases if they do choose to watch. The Commission has no mandate to act in loco parentis for America's adult viewing population by restricting the availability of home shopping programming.

The Notice nonetheless seeks comments on whether the Commission should disregard the emphatic public demand for televised home shopping services and reimpose commercial

10/ See, e.g., "Old Kentucky home shopping," Broadcasting & Cable, December 6, 1993, at 91.

11/ "Time Warner, Spiegel shop for viewers," Broadcasting & Cable, October 4, 1993, at 22; Communications Daily, October 27, 1993, at 7; Broadcasting & Cable, October 25, 1993, at 65.

12/ "French retailer considers TV home shopping," Financial Times, November 26, 1993, at 20.

limits or other restrictions on the format. Any such return to pre-deregulation limitations on the telecast of commercial matter would be content-based regulation clearly prohibited by the First Amendment. Such restrictions would be especially constitutionally abhorrent in light of the lack of any demonstrated or demonstrable harm associated with the airing of commercials for, or commercial material concerning, lawful products or services.

The home shopping format should not be singled out for isolated repressive regulatory treatment. Transactional video -- a concept not even contemplated in 1984, but now being developed in the rapidly expanding video marketplace -- serves an affirmative public interest purpose, affording particular audiences access to the commercial marketplace they might not otherwise enjoy. It has also materially contributed to the growth and development of minority television station ownership. There is no legal or technological basis for regulatory differentiation between programming primarily devoted to entertainment and programming primarily devoted to sales.

The Commission cannot constitutionally discourage one particular program format through reimposition of commercial limits or other restrictions on home shopping programming. It must instead promptly terminate this inquiry by affirming Television Deregulation's grant of

freedom to experiment with new programming and commercial formats, letting the marketplace rather than the government be the determinant of success.

The Public Interest Precludes
Restrictive Regulatory Treatment of Home Shopping Formats

In deregulating television stations' commercial practices, the Commission noted that "[a] significant danger posed by our commercial guideline is that it may impede the ability of commercial television stations to present innovative and detailed commercials...[O]ur regulation may also interfere with the natural growth and development of broadcast television as it attempts to compete with future video market entrants."^{13/} The agency hoped that commercial deregulation would "...promote licensee experimentation and otherwise increase commercial flexibility."^{14/}

The advent and growth of home shopping fulfilled this hope, and provide direct evidence of the wisdom of deregulation. Indeed, the Commission has expressly acknowledged that home shopping represents precisely the type of innovative programming which Television Deregulation was designed to encourage.^{15/}

13/ Television Deregulation, 98 FCC 2d at 1104.

14/ Id. at 1105.

15/ See, e.g., Family Media, Inc., 2 FCC Rcd 2540, 2542 (1987), aff'd sub nom., Office of Communication of the United Church of Christ v. FCC, 911 F.2d 803 (D. C. Cir.

(continued...)

Home shopping represents the first practical and successful application of interactive television. No television station had aired such programming before HSN introduced the format. The public liked and accepted it and others are now experimenting with it. This pioneering effort could well be the forerunner of additional inventive applications of interaction between viewers and the programmer. It would be a tragic irony indeed, to penalize HSN for its role as the visionary of interactive television. The Commission should not act to discourage the risk-taking which drives such creativity by returning to a bygone era of excessive regulation.

To do so would be to betray the very essence of the public interest. As the Supreme Court recognized almost 50 years ago, the public interest is not static, but is a consistently evolving standard, designed to be sufficiently flexible to ensure that the public continues to be served notwithstanding changes in society and the media marketplace.^{15/} Congress purposely left the standard undefined, to be given meaning commensurate with current

^{15/} (...continued)
1990) ["UCC"] ["We view this relatively new 'format' as an example of license[e] experimentation and regulatory flexibility."]; see also Home Shopping [Network] [sic], Inc., 4 FCC Rcd 2422 (1989).

^{16/} See FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

conditions through the Commission's exercise of its broad powers under the Communications Act.^{17/} The Commission has responded to Congress' mandate by refining its definition of the public interest in response to changing marketplace developments.

For example, the Commission at one time viewed extensive time brokerage arrangements as inconsistent with the public interest.^{18/} As broadcast competition developed, the Commission re-examined such arrangements and concluded that they were a potential source of diverse programming which served, rather than disserved, the public interest.^{19/} Similarly, the Commission has changed its media ownership restrictions in response to the evolving media marketplace.^{20/}

17/ See, e.g., National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 638, n. 37 (D.C. Cir. 1976); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1423-1424 (1983).

18/ Policy Statement on Part-Time Programming, 82 FCC 2d 107, 108 (1980).

19/ Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), recon., 7 FCC Rcd 6387; see also, Notice of Proposed Rulemaking, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

20/ For example, the Commission has deleted the Golden West policy, Report and Order, BC Docket No. 80-438, 87 FCC 2d 668 (1981); the Top 50 market policy, Report and Order, BC Docket No. 78-101, 75 FCC 2d 585 (1979), recon. denied, 82 FCC 2d 329 (1980), aff'd sub nom., NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982); and the regional concentration of control rules, Report and Order, MM Docket No. 84-19, 101 FCC 2d 402 (1984), recon. denied, 100 FCC 2d 1544 (1985).

(continued...)

Here, too, the changing video landscape demands a fresh approach to the public interest. Over the past two decades, the nation's viewers have been introduced to a fourth national network (with a fifth and sixth apparently on the horizon) and a dramatically increased number of sources for video programming. New video formats -- not just home shopping, but all-news, all-sports and even cooking -- are being inaugurated regularly. (Notably, other new video program formats are not subject to particular regulatory restrictions.) This new video environment requires a new approach to the public interest.

The Commission's past decisions sought to give contemporary meaning to the public interest standard. The results of this inquiry must likewise look forward, not backward.

20/ (...continued)
It has substantially modified its radio ownership rules, Report and Order, MM Docket No. 91-140 7 FCC Rcd 2755 (1992), recon., Memorandum Opinion and Order and Further Notice of Proposed Rule Making, FCC 92-361 (September 4, 1992); and its one-to-a-market rule, Second Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), recon., 4 FCC Rcd 6489 (1989). It has modified its television station multiple ownership rules, Report and Order, Gen. Docket No. 83-1009, 100 FCC 2d 17 (1984), recon., 100 FCC 2d 74 (1985), and proposed substantial additional relaxation of television ownership restrictions, Notice of Proposed Rulemaking, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992). All of these actions have been premised upon the Commission's express recognition that changes in the media marketplace required changes in its interpretation of the public interest.

Given Today's Media Marketplace,
There is No Governmental Interest
In the Repression of Broadcast Commercial Speech

Thirty years ago when the Commission's En Banc Programming Inquiry denounced overcommercialization,^{21/} the video marketplace was far different than it is today. As of January 1, 1961, shortly after the decision, there were only 583 television stations on the air.^{22/} Cable television was but an isolated local phenomenon designed only to enhance reception quality. Satellite delivery of programming, much less direct satellite broadcasting, was unknown. There were three major television networks which dominated television programming.^{23/} In that era of limited choices and limited competition, there may have been some public interest in limiting commercialization and program-length commercials.^{24/}

21/ Commission en banc Programming Inquiry, 44 FCC 2203 (1960).

22/ Broadcasting & Cable Yearbook (1993) at C-226. There were also 4,354 AM and FM stations, with AM being the dominant radio medium (3,539 stations). Id. at B-590.

23/ This dominance continued well into the 1970's. See, e.g., Network Television Broadcasting, 23 FCC 2d 382 (1970), aff'd sub nom., Mt. Mansfield Television v. FCC, 442 F.2d 470 (2d Cir. 1971).

24/ The Federal Radio Commission's statement that "...broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers" must thus be read against its concurrent observation about the then "paucity of channels." Statement Made by the Commission on August 23, 1928,

(continued...)

But times have changed. As of January 1, 1985, shortly after Television Deregulation, there were 1,149 television stations on-air, as well as 4,754 AM stations and 4,888 FM stations.^{25/} There were only 6,600 cable systems, serving 32,000,000 subscribers.^{26/}

There are now 1,155 commercial and 363 non-commercial television stations, as well as 1,436 low power television stations and a total of 11,558 AM and FM radio stations.^{27/} Broadcast television is overshadowed by cable television, with approximately 11,385 systems serving over 55,000,000 subscribers^{28/} with a mind-boggling array of satellite-delivered and locally-produced video programming services. Direct satellite broadcasting is about to take

24/ (...continued)
Relative to Public Interest, Convenience or Necessity, 2 FRC Ann. Rep. 166 (1928), reprinted in F. Kahn, ed., Documents of American Broadcasting (4th ed 1984) ["Kahn"] at 57, 60, 61.

25/ Broadcasting & Cable Yearbook (1993) at C-226, B-590.

26/ Television & Cable Factbook, No. 61, Services Volume (1993) at I-68.

27/ FCC Public Notice, "Broadcast Station Totals as of November 30, 1993" (December 10, 1993).

28/ TV & Cable Factbook, No. 61, Cable Volume at F-2 (1993).

off.^{29/} Talk of 500-channel video services on a single wire to the home no longer sounds like a fairy tale.

In this media environment, the prospect of a return to commercial limits sounds like a return to the Ice Age. Notions of spectrum scarcity which once might have supported some restrictive regulations have little practical or legal validity on contemporary market environments.^{30/} Today's cornucopia of media offerings offers viewers a staggering array of options, including channels that offer nothing but sports, news, comedy, cooking or coverage of legislative or judicial proceedings. In such a media marketplace, so different from that of a decade ago, some stations' adoption of a format which consists primarily of sales presentations or program-length commercials does not disserve the goal of viewpoint diversity. To the contrary, it contributes to it.

In short, in an era where choice and competition characterize television broadcasting, there is no credible justification for such archaic content-based limitations.

29/ See, e.g., "Countdown to DBS," Broadcasting & Cable, December 6, 1993, at 30.

30/ Indeed, the fundamental concept of spectrum scarcity is itself the subject of significant judicial reevaluation. See, e.g., Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 517 (D.C. Cir. 1986), reh'g en banc denied, 806 F.2d 1115 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 3196 (1987); Arkansas AFL-CIO, Inc. v. FCC, No. 92-1115 (8th Cir. Dec. 7, 1993) [Arnold, C.J., concurring].

As the Supreme Court has stated, "...because the broadcast industry is dynamic in terms of technological change, solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."^{31/} Commercial limitations are "outmoded" solutions to a no-longer-extant problem.

Calls for the reimposition of governmental restrictions on the broadcast of commercial speech notwithstanding existing market conditions are premised upon the notion that primarily commercial, as opposed to primarily entertainment programming, is somehow inherently bad. Such claims are frequently supported by reference to isolated language in distant legislative history and outdated decisions which reflect a media environment which has not existed for years.

However, the early legislative history of the Communications Act, even if deemed completely relevant to today's media marketplace, fails to support commercial reregulation. In opposing mandatory carriage for home shopping formatted stations, for example, the Center for the Study of Commercialism ["CSC"] referenced Senatorial colloquies on a proposed (and defeated) amendment which would have required that 25% of radio facilities be reserved

^{31/} Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973).

for use by educational organizations.^{32/} The language CSC cites, however, relates specifically to the defeated amendment, not to more general concepts relating to broadcast of commercial matter.

Even if, arguendo, it is interpreted as CSC urges, the cited language is merely a statement about public demand for commercial programming rather than a conclusion as to its desirability.^{33/} If public demand is to be the measure of the need for regulation, then the demonstrated growth and public appeal of the home shopping format in all video media support continued deregulation.

Decades-old Commission pronouncements concerning commercialization likewise fail to point to any inherently harmful aspect of commercial programming. The Commission appears to have been concerned that too much commercial matter is offensive to the audience^{34/} or will impede licensees' abilities to comply with their public service

32/ Comments of the Center for the Study of Commercialism, MM Docket No. 93-8 (March 29, 1993) at 6 - 7.

33/ "That is not what the people of this country are asking for." 77 Cong. Rec 8830 (May 15, 1923) (statement of Senator Dill).

34/ See, e.g., Report and Order, Docket No. 15083, 36 FCC 45 (1964) ["Commercial Advertising Standards"]: "'...this station is one which exists chiefly for the purpose of deriving an income from the sale of advertising of a character which must be objectionable to the listening public...' " [source not provided].

obligations.^{35/} Neither concern retains validity in today's media marketplace.

Television Deregulation recognized that in highly competitive contemporary media markets, viewers are perfectly capable of finding alternatives to offensive programming and do not need the Commission to protect them from programming which is not to their taste. The variety of entertainment and information available today on broadcast television (not to mention other video media) eliminates the pressure which once was placed on television stations to be all things to all viewers.^{36/} It also ensures

35/ See, e.g., id.: "The Federal Radio Commission stated as a principle of decision in competition for the assignment of frequencies that 'the amount and character of advertising must be rigidly confined within the limits consistent with the public service expected of a station'." [source not provided]; Public Service Responsibility of Broadcast Licensees (The Blue Book) (March 7, 1946), reprinted in Kahn, at 148, 157 ["...some stations during some or many portions of the broadcast day have engaged in advertising excesses which are incompatible with their public responsibilities, and which threaten the good name of broadcasting itself."]

36/ Almost a decade ago, Television Deregulation recognized the extent of diversity within media markets by allowing stations to rely on other market stations' programming in satisfying certain public service obligations. Television Deregulation, 98 FCC 2d at 1092. Even today, in meeting their affirmative obligation to provide children's programming, stations are encouraged to review children's programming on other outlets in their markets in making their programming decisions. Children's Television Programming, 6 FCC Rcd 2111, recon., 6 FCC Rcd 5093 (1991). Contemporary media diversity thus eliminates the Commission's concerns of 30 years ago that excess commercialization might prevent television stations from

(continued...)

that formats which are offensive to viewers will not survive. The marketplace is more effective than the government in ensuring that station formats will conform to viewers' desires,^{37/} and the popularity of the home shopping format indicates that viewers desire its unrestricted availability.

Further, the Commission has often explicitly recognized that a home shopping entertainment format is not incompatible with complete satisfaction of a station's public interest programming obligations. The SKC Stations' submissions in MM Docket No. 93-8 support the Commission's findings in this regard, and established that their public service programming performance substantially exceeds that of most other conventionally-formatted UHF television stations not affiliated with a major national network in their markets.^{38/} The Commission reviewed those submissions

36/ (...continued)
affording adequate entertainment and other programming of interest to the public.

37/ Critics of the home shopping format have never explained why its success should be penalized other than their own personal biases.

38/ Both the Commission and the courts have thoroughly reviewed the SKC Stations' general entertainment and non-entertainment programming and concluded that the stations' operations conformed to the public interest. See, e.g., Family Media, Inc., 2 FCC Rcd 2540 (1987); Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324 (1986), recons. denied, Press Broadcasting Co., 3 FCC Rcd 6640 (1988), aff'd, UCC. Silver King Broadcasting of Vineland,
(continued...)

and affirmatively concluded that the extensive record before it "reflects no detriment to the public caused by the [] existing programming operations" of stations with home shopping formats.^{39/} Relying upon such repeated conclusions by the Commission and the courts, SKC and others have invested hundreds of millions of dollars in the construction, modification and operation of station facilities used for the presentation of home shopping programming.

So long as stations comply with their fundamental public service programming obligations -- and the Commission has repeatedly concluded that stations with a home shopping format do so -- the nature of their entertainment programming (so long as it is consistent with other statutory requirements) should not and cannot constitutionally be a matter of Commission concern.

Past Commission statements which criticize program-length commercials as "subordinating programming in the public interest to programming in the interests of

38/ (...continued)
Inc., 5 FCC Rcd 7499 (1990); The license renewal applications of the SKC Stations have routinely been granted and SKC is not aware that any station having a home shopping format has been denied renewal or been the subject of a successful challenge based upon its programming format.

39/ Report and Order, MM Docket No. 93-8, 8 FCC Rcd 5321, 5328 (1993) ["Must Carry Report"].

salability"^{40/} never explain what harm is associated with programming for salability. All commercial station programming is ultimately designed to gain revenue: home shopping entertainment differs from conventional entertainment in that regard only in its elimination of the advertiser as a middleman.^{41/} That distinction, however, affords no basis for any regulatory differentiation.

Contemporary criticism of home shopping boils down to nothing more than an adverse visceral reaction to broadcast commercial matter in any form.^{42/} For example, Senator Breaux' support of legislation which would have deprived stations with a home shopping format of mandatory cable carriage rights was motivated by his "disdain" for the format.^{43/} Then-Chairman Quello also expressly recognized

^{40/} Commission Policies on Program Length Commercials, 44 FCC 2d 985 (1974).

^{41/} It is hornbook law that broadcasting was established as a private business enterprise to be operated on commercial principles. See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

^{42/} Perhaps this dislike stems from a belief that the government should dictate how consumers spend money. Quite apart from the impact such a policy would have on the nation's economy, the fact is that studies show that home shoppers tend to be shoppers in any event, and see home shopping "as another viable, legitimate shopping option, part of their regular shopping arsenal." WSL Marketing "Smart Marketing Report," "Television Shopping: The New Retailing" (1993) ["WSL Report"] at 2.

^{43/} See "Statement of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc." ["Smolla (continued...)"]

the "paternalistic bias" which animates home shopping's critics.^{44/}

But those critics have never explained why such programming is less desirable than quiz shows which offer merchandise for prizes, soap operas, talk shows which emphasize sexual topics or violent or sexually-explicit dramatic programs. They never suggest a constitutional basis for a Commission decision that it is permissible for viewers to be entertained by "Gilligan's Island" or "NYPD Blue," but not by home shopping programming.^{45/} And they cannot point to any societal harm which might support the

^{43/} (...continued)
Statement"], Exhibit No. 1 at 3-4. As Professor Smolla notes, extraordinary must-carry burdens were "...imposed on home shopping service broadcasters not because they had caused any identifiable harm to the public but solely because of a paternalistic dislike of their programming format." Id. at 5.

^{44/} Must Carry Report, Separate Statement of Chairman Quello ["People probably are not thinking about what has been called the 'electronic superhighway' when they joke about Ginsu knives and cubic zirconium jewelry. And while the products being sold at the moment on some channels may attract ridicule in some quarters, it is evident that home shopping services are a precursor to this promising future in which consumers may use their TVs for more than just passive viewing."]

^{45/} Home shopping is entertaining. As one study describes the service:...consumers see unusual merchandise, can talk to a friendly host, be entertained by a celebrity guest, learn about the merchandise in a non-threatening environment, order from the comfort of their armchair -- and save money. It's fun." WSL Report at 18.

governmental interest necessary to legitimate content-based regulation.^{46/}

By contrast, children's television commercial limits are premised upon a specific Congressional mandate^{47/} and supported by substantial evidence of the need for restrictions.^{48/} Notwithstanding the societal harm attributed to violent and sexually-explicit television programming,^{49/} Congress and the Commission have thus far

46/ While there have been numerous studies on television violence -- whose conclusions are disputed -- there is no study or empirical evidence to suggest there is any societal harm attributable to home shopping programming.

47/ Children's Television Act of 1990, Pub. L. No. 101-437, 101st Cong., 1st Sess. (codified at 47 U.S.C. § 303b[a][2]); see Children's Television Programming, 6 FCC Rcd 2111 (1991), recons., 6 FCC Rcd 5093 (1991). There is no similar Congressional mandate with respect to commercial limitations. Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1438 (D.C. Cir. 1983).

48/ See, e.g., "Children's Television," Hearing before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce (April 6, 1989) Serial No. 101-32; "Education, Competitiveness and Children's Television," Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (April 12, 1989) S. Hrg. 101-69; "Commercial Time on Children's Cable TV," Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (October 18, 1989) S. Hrg. 101-426.

49/ See, e.g., Notice of Proposed Rulemaking, GC Docket No. 92-223, 7 FCC Rcd 6464, 6468 (1992) [Separate Statement of Commissioner Duggan]; Chairman James H. Quello, Speech before the NATPE/INTV Convention (Jan. 24, 1993); "Stamping Out TV Violence: A Losing Fight," The Wall Street Journal (Oct. 26, 1993) at B1; "Violence on Television," Hearing before the Subcommittee on Crime and Criminal Justice of the

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